

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JESUS MARTINEZ,

Claimant,

v.

CRANNEY BROTHERS FARMS,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

**IC 04-001040**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

Filed October 20, 2006

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on January 26, 2006. Claimant was present and represented by Stanley G. Cole of Rupert. Scott R. Hall of Idaho Falls represented Employer/Surety. Simon Rodriguez served as interpreter. Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition. The parties submitted post-hearing briefs and this matter came under advisement on July 14, 2006.

**ISSUES**

The issues to be decided as a result of the hearing are:

1. Whether Claimant suffers from a compensable occupational disease;
2. Whether Claimant's condition is due in whole or in part to a pre-existing injury or disease not work related;

3. Whether Claimant is entitled to reasonable and necessary medical care, and the extent thereof;
4. Determination of Claimant's average weekly wage;
5. Whether Claimant is medically stable, and, if so, the date thereof;
6. Whether and to what extent Claimant is entitled to:
  - a) Total temporary disability benefits;
  - b) Permanent partial impairment benefits;
  - c) Permanent partial disability benefits;
7. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate; and
8. Whether Claimant is entitled to an award of attorney fees for Defendants' unreasonable denial of benefits pursuant to Idaho Code § 72-804.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that his exposure to certain chemicals and molds in a potato cellar where he was working caused him to develop a disabling lung condition.

Defendants contend that there is no medical evidence of a connection between Claimant's lung disease and his working environment.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. The testimony of Claimant and his employer, Ryan Cranney, presented at the hearing.
3. Claimant Exhibits 1-10 admitted at the hearing.
4. Defendants' Exhibits A-H admitted at the hearing.

5. The post-hearing deposition of Emil J. Bardana, Jr., M.D., taken by Defendants on February 15, 2006.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

**Preliminary evidentiary matter:**

Claimant seeks admission into evidence a letter from his treating physician, N. John East, M.D., dated January 19, 2006 (the letter). Defendants have objected on the ground that said letter was not developed nor provided outside the ten-day parameter of Rule 10, JRP (Rule 10). By letter to Defendants' counsel dated January 20, 2006, Claimant's counsel first advised that he intended to introduce the letter at the hearing scheduled for January 26<sup>th</sup>. Claimant's counsel filed Amended Claimant's Hearing Exhibits on January 24<sup>th</sup> including the letter.

On January 23<sup>rd</sup>, Defendants' counsel filed a motion to exclude the letter as untimely pursuant to Rule 10 in that the last day within which to disclose intended exhibits was January 13, 2006. Attached to Defendants' motion was an affidavit of Colleen Poole, a member of Defendants' attorney's staff, who indicated that on January 13<sup>th</sup>, she contacted Dr. East's office and was assured that there were no more documents to be provided other than what was already in Defendants' attorney's possession. According to Defendants' attorney, the letter is inconsistent with prior opinions expressed by Dr. East that had been forwarded to their independent examiner for comment. Defendants argue they are prejudiced in that there is no way to have their expert comment on the letter at this late date. Defendants further point out that during a pre-hearing conference held on December 19, 2005, Claimant's counsel informed Defendants' counsel and this Referee that he was attempting to obtain additional information from Dr. East and he has had ample time to do so and Defendants are now prejudiced.

Defendants also objected to a continuance as this matter has already been vacated and re-set twice, both times at the request of Claimant.

On January 24, 2006, this Referee signed an Order Granting Motion to Exclude Evidence as being untimely disclosed without good cause pursuant to Rule 10. On January 25, 2006, Claimant filed a Motion to Reconsider Order to Exclude Evidence dated January 24, 2006 and Request for Immediate Hearing on Said Motion with supporting affidavit of counsel with the letter attached and an affidavit from Claimant's daughter. Defendants' objection to the letter as an attachment to Claimant's counsel's affidavit is sustained; their objection to the remainder of Claimant's counsel's affidavit is overruled.

Claimant's attorney's affidavit states that during the course of these proceedings, he has been required to work with Claimant's adult daughter, Dora Gochnour, as a Spanish interpreter, as Claimant speaks no English. He further states that during the course of these proceedings, it was necessary to obtain further information from Dr. East regarding causation (the letter). As Ms. Gochnour had accompanied Claimant to his visits with Dr. East, Claimant's counsel found it effective to communicate with Dr. East's staff through Ms. Gochnour. Further, "That over the past few weeks prior to hearing, it became necessary to attempt to obtain medical record [sic] or report from Dr. East related to the causal relationship of the work environment and the occupational disease contracted by Claimant." Affidavit of Stanley Cole, p. 2. Consequently, Ms. Gochnour repeatedly contacted Dr. East's office regarding obtaining his causation opinion. Apparently, Ms. Gochnour provided Dr. East with an orthopedic IME regarding Claimant's back, rather than Defendants' expert's report regarding his lung disease. Dr. East responded to the orthopedic IME by stating he was not an orthopedist and could not comment on the IME. At that point, Claimant's counsel contacted Dr. East's office and informed them that Dr. East's

response to the orthopedic IME was not the report he needed. Thereafter, Dr. East faxed the letter to Claimant's counsel, who received the same on January 20, 2006, and faxed the letter to Defendants' attorney who first saw the same on January 23<sup>rd</sup> as he was out of his office on January 20<sup>th</sup>.

Also on January 25, 2006, Claimant filed a motion to vacate and reschedule the hearing based on the order excluding the letter. Defendants objected.

Defendants' expert, Dr. Bardana, issued his first comprehensive report on August 14, 2004. Ms. Gochmour, in her affidavit,<sup>1</sup> states that she sent "follow-up copies" of Dr. Bardana's report to Dr. East on November 29, 2005, presumably to obtain Dr. East's response thereto. Ms. Gochmour called to follow-up with Dr. East on December 6<sup>th</sup> (twice), 9<sup>th</sup> (twice), 12<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 20<sup>th</sup>, January 3<sup>rd</sup>, 5<sup>th</sup> (twice), 6<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup> (twice), 13<sup>th</sup> (explained mistake in Dr. East's responding to orthopedic IME), and the 17<sup>th</sup> (twice). *See*, Affidavit of Dora Gochmour.

On January 25, 2006, the Referee conducted a telephone conference with the parties to allow them to argue their respective positions. The conference began at 4:00 p.m. and lasted approximately one hour. The Referee adhered to his decision to exclude the letter and denied Claimant's motion to vacate the hearing set for the following day. At hearing, the parties were given the opportunity to make a record regarding the foregoing motions and they exercised that opportunity.

Claimant argues that he should be excused from complying with Rule 10 because he exercised due diligence in attempting to timely obtain the letter. Rule 10 provides in pertinent part:

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<sup>1</sup> Defendants' objection to Ms. Gochmour's affidavit is overruled.

### C. Exhibits –

1. Unless good cause is shown to the contrary at least 10 days prior to a hearing, each party shall serve on all other parties complete, legible, and accurate copies of all exhibits to be offered into evidence at hearing, including but not limited to medical records.

2. In the event that the existence of a proposed exhibit is discovered in good faith and with due diligence less than 10 days before the date of the hearing, the party discovering the same shall immediately notify all other parties of the existence of the exhibit.

G. **Medical Reports** – Any medical report(s) existing prior to the time of the hearing, signed and dated by a physician, or otherwise sufficiently authenticated, may be offered for admission as evidence at the hearing. The fact that such report(s) constitutes hearsay shall not be grounds for its exclusion from evidence.

Rule 10, JRP (Revised January 1, 2004). Emphases added.

Claimant argues that through his due diligence, the letter was “discovered” and disclosed within the 10-day period and should be admitted. The Referee disagrees. The letter is apparently central to Claimant’s case in that it involves a treating physician’s opinion regarding causation. If so, one is left to wonder why Claimant’s counsel left it up to a layperson, Claimant’s daughter, to continually, and unsuccessfully, attempt to timely obtain the letter from Dr. East. There is no indication that Claimant’s counsel ever requested the letter by way of a cover letter or that he personally sent to Dr. East whatever report he wanted him to respond to until January 17<sup>th</sup>, just nine days prior to hearing and beyond the 10-day disclosure rule. The problem with depending on Ms. Gochmour is evident because Dr. East initially responded to the wrong IME. While Claimant’s daughter may have made a legitimate effort to obtain the letter, that simply was not her job, especially in light of a rapidly approaching hearing date.

Also, the letter was not “discovered” a few days before the hearing; it was created a few days before the hearing. Further, this matter had been set for hearing on June 7, 2005, and August 17, 2005, and vacated at Claimant’s request. If Claimant has current causation issues, he

must also have had causation issues prior to the two previously set hearings. There is no indication that Dr. East was unavailable for any extended periods of time. The Referee finds that Claimant had ample time to obtain and exchange his medical evidence with Defendants, as Defendants did with Claimant. Rule 10 is a two-way street. The defense herein has expended time, energy, and money preparing for three hearings, only one of which actually took place. Another continuance due to Claimant's lack of timely preparation would be unduly prejudicial.

Claimant also argues that section G of Rule 10 refers to medical records existing prior to the time of the hearing and does not mention 10 days before the hearing, only prior to the time of the hearing. Because section G refers specifically to medical records, that section somehow trumps the general 10-day disclosure requirement for all other proposed exhibits referred to in section 1. That argument is without merit for two reasons. First, section G merely states that medical records do not have to be "properly" authenticated to be admissible assuming they were otherwise disclosed pursuant to section 1. Second, section 1 specifically mentions medical records.

The Referee adheres to his original decision to exclude the letter and deny Claimant's request for a continuance.

Finally, Defendants' motion to strike the copy of the letter attached to Claimant's opening brief, and in any reference therein as to its contents, is granted.

### **FINDINGS OF FACT**

1. Claimant was 53 years of age and resided in Burley at the time of the hearing. He does not speak, read, or write in English. He was born and raised in Mexico and has been in the United States since 1957. He has not received any formal education. He began working for Employer as a farm laborer in 1992.

2. Claimant testified that in early March, 2003:

Q. (By Mr. Cole): And describe what you were doing that caused you to suffer an injury or a disease.

A. When I got sick, we were inside the [potato] cellar getting some seed. There was [sic] two people, okay, and one was cleaning, the other was moving the loader. Okay. This is like a piler. And what the operator does is he moves that into the potato pile and that just loads the potatoes into the piler onto the truck. Okay. We were cleaning up all the rotten potatoes, and there was a lot of dust and a lot of chemicals. And that's when I started getting sick.

Hearing Transcript, p. 48.

3. Claimant first visited Harry B. Ditmore, M.D., of Rupert, on March 10, 2003. Dr. Ditmore's handwritten notes for that date are unreadable, but a typed office note dated April 11, 2003, indicates that Claimant had been improving since March 10, but had now relapsed. Dr. Ditmore diagnosed questionable pneumonia, tuberculosis and neoplasm. A tuberculin test was negative. He noted that Claimant had quit smoking. Dr. Ditmore referred Claimant to Ronald K. Fullmer, M.D., a pulmonologist in Twin Falls.

4. Claimant first saw Dr. Fullmer on April 16, 2003. At that time he was complaining of fever, increased cough and some URI symptoms beginning in early March while working in a dusty potato cellar. Claimant told Dr. Fullmer that he was wearing a mask, but testified at the hearing that he was not. Claimant denied any history of lung disease or pneumonia.<sup>2</sup> Dr. Fullmer recorded a one pack a day times 40 years smoking history but noted that he had recently stopped smoking. Dr. Fullmer diagnosed right lower lobe/possible right middle lobe pneumonia with pleural effusion that was expected to improve with medications.

5. Claimant came under the care of N. John East, M.D., a pulmonologist practicing in Boise, on the referral by Dr. Ditmore. Claimant first saw Dr. East on December 3, 2003. At

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<sup>2</sup> An emergency room note from Cassia Regional Medical Center dated March 2, 1998, indicates that Claimant was diagnosed with bronchial pneumonia secondary to atelectasis (collapsed lung).

that time, Claimant complained of flu-like symptoms when he worked in potato cellars that contained mold from rotting potatoes. Dr. East noted that Claimant's only chemical exposure, per his history, was to sodium hypochloride solution. Claimant again denied any prior bouts of pneumonia. Dr. East also noted, "The patient describes worsening of breathing in association with steam, cold air, dust, automobile exhaust fumes, and exertion. This is often accompanied by wheezing and has been present for several years to a time predating the exposure of April and May detailed above." Claimant's Exhibit 2.

6. Dr. East reached the diagnosis of hypersensitivity pneumonia from exposure to mold spores in Employer's potato cellars. He described that condition as noninfectious but could result in irreversible lung disease with repeated exposures to mold. Dr. East also diagnosed asthma and an elevated right hemidiaphragm of unknown etiology.

7. Emil J. Bardana, Jr., M.D., examined Claimant on August 14, 2004, at Surety's request. Dr. Bardana is a physician and currently a half-time professor of medicine at the Oregon Health and Science University in Portland. Prior to giving up his tenure in 1999, Dr. Bardana was vice chair of the department of medicine and head of the division of allergy and immunology.

8. Dr. Bardana reviewed medical records, performed testing, took Claimant's history with the interpretive assistance of Claimant's son and wife, and examined Claimant. Although not reported by Claimant, allergen testing revealed Claimant to be "very allergic." Dr. Bardana Deposition, p. 10. However, Dr. Bardana was unable to establish by testing that Claimant was allergic to any of the common spores likely to be found in potato cellars. He disagreed with Dr. East's diagnosis of hypersensitivity pneumonia and concluded that Claimant suffered from "community acquired" pneumonia, that is, it was acquired from his "fellow man"

as opposed to the potato cellar environment. Dr. Bardana also concluded that Claimant's hay fever and asthma were not work-related but are genetic and caused by both indoor and outdoor allergens.

9. In addition to the diagnosis of community acquired right middle lobe pneumonia, Dr. Bardana also diagnosed partial paralysis of the right hemidiaphragm of unknown etiology, pulmonary hemosiderosis (bleeding into the lungs) of unknown etiology, bronchiolitis obliterans (inflammation of the lungs), and a history of tobacco abuse. Dr. Bardana did not relate any of those conditions to Claimant's work in Employer's potato cellars.

10. Dr. Bardana summarized his findings as follows:

In summary, Mr. Martinez developed community-acquired pneumonia which gradually transitioned to a bronchiolitis obliterans with ground glass nodularities and this was superimposed on a partially paralyzed right hemidiaphragm. He has never had bronchoscopy<sup>3</sup> with washings or transbronchial biopsy, nor has he had any attempt made to biopsy these lesions to better understand the nature of the lesion and the histopathology that underlies these findings. Without cultures having been done, without any bronchoscopy and without any histologic evidence, it is almost impossible to know precisely what underlies his pulmonary pathology, but in my view Dr. East's hypotheses are completely unfounded.

Claimant's Exhibit 5, p. 26.

11. Rather than recommend further treatment for Claimant, Dr. Bardana would rather concentrate on obtaining a bronchoscopy to better be able to determine what course future treatment should take. In a letter dated May 31, 2005, to Surety, Dr. Bardana recommended that Surety pay Dr. East to perform a bronchoscopy/biopsy and send the tissue obtained to a pathologist at the Mayo Clinic to read the studies to either rule in or rule out hypersensitive pneumonia as a working diagnosis.

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<sup>3</sup> Claimant has not been able to afford a bronchoscopy and certain other diagnostic testing.

12. Dr. East performed the bronchoscopy/biopsy on May 26, 2005. The pathology department at Saint Alphonsus Regional Medical Center as well as the Mayo Clinic read the specimen, and both departments read the specimen to show alveolar hemosiderosis. Neither department found **any** support for the diagnosis of hypersensitivity pneumonia or pneumonitis. Dr. East agreed with this diagnosis and had always felt that his diagnosis of hypersensitivity pneumonia was speculative in any event.

### **DISCUSSION AND FURTHER FINDINGS**

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged contraction of Claimant's occupational disease include Idaho Code §72-102(21) which define occupational diseases and related terms as follows:

- (a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.
- (b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.
- (c) "Disablement," except in cases of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from

performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and “disability” means the state of being so incapacitated.

Idaho Code §72-437 defines the right to compensation for an occupational disease:

When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or in case of his death, his dependents shall be entitled to compensation.

Lastly, Idaho Code §72-439 provides:

An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer’s employment.

13. Here, there is **NO** medical evidence at all that any of Claimant’s pulmonary problems, or any other conditions, were caused by, or actually incurred in, his employment. Claimant testified that he was well after the 2002 farming season. Claimant’s Employer testified that Claimant appeared to be not feeling well and was having problems with his breathing even before he began work in the 2003 season and he joked that Claimant would have to quit smoking. Dr. Bardana testified that Claimant’s obesity and smoking history were major contributors to his lung condition. Finally, Claimant was not exposed to the chemicals he claims to have caused his condition until after he first sought medical attention on March 10, 2003.

14. Claimant has failed to prove he suffers from a compensable occupational disease.

### CONCLUSIONS OF LAW

1. Claimant has failed to prove he suffers from a compensable occupational disease.
2. All other issues are moot.

### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this \_\_29<sup>th</sup>\_\_ day of \_\_September\_\_, 2006.

INDUSTRIAL COMMISSION

\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the \_20<sup>th</sup>\_ day of \_\_October\_\_, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STANLEY G COLE  
PO BOX 407  
RUPERT ID 83350-0407

SCOTT HALL  
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IDAHO FALLS ID 83405-1630

\_\_\_\_/s/\_\_\_\_\_  
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